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Court of Appeals
Division II
State of Washington
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No. 49985-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AKEEN HEYER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The errors in admitting hearsay and medical records requires reversal of the conviction for third degree assault and remand for a new trial.

Over Mr. Heyer's hearsay objection, the complaining witness was permitted to testify what medical staff told him. RP 74-75. The court admitted the statements under the medical diagnosis or treatment exception. ER 803(a)(4). The State properly concedes that this was error. Br. of Resp't at 1. The exception applies to statements made by the patient to the medical provider, not the reverse. Br. of App. at 6-7. The Court should accept the State's concession.

The State, however, maintains this error is harmless because medical records (exhibit 10) were properly admitted. Br. of Resp't at 2. Because the medical records were also improperly admitted, the error is not harmless.

The State contends that the medical records were admitted into evidence by agreement. Br. of Resp't at 2. The record does not support the State's contention.

Contrary to the State's position, defense counsel did not agree (let alone stipulate) that the medical records were admissible. Defense counsel agreed the records custodian (who would have likely testified how the records were maintained) would not be necessary for the records to be

admitted. RP 112-13. He maintained, however, that testimony from the attending physician *would* be necessary. RP 112. There was no concession that the medical records were admissible. Br. of App. at 11-12.

The State argues that Mr. Heyer's objection was not sufficiently specific. Br. of Resp't at 3-4. But the trial court understood what defense counsel was arguing. RP 112-13. For this reason, the court stated, "I'm going to admit it over objection." RP 113. Thus, defense counsel's objection was sufficiently specific. ER 103(1)(a) ("In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.") (emphasis added); State v. Swanson, 181 Wn. App. 953, 958, 327 P.3d 67 (2014) (specific ground was apparent from context and therefore the claimed error was preserved for review).

As explained, without the testimony from a "qualified witness," (i.e., the attending physician) the business records exception did not justify admission of the records. RCW 5.45.020; see State v. Sellers, 39 Wn. App. 799, 806 & n.3, 695 P.2d 1014 (1985) (physician's testimony allowed document to be admitted under business records exception); Br. of App. at 12-13. Moreover, the business records exception does not apply where the professional who created the record exercised skill and

discretion, including where a physician diagnoses a patient. State v. Hopkins, 134 Wn. App. 780, 790, 142 P.3d 1104 (2006) (“Where the preparation of a report requires the exercise of the declarant’s skill and discretion, the business record exception does not apply.”); Br. of App. at 12-13. The State’s contrary argument is not supported by citation to authority and should be rejected. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court does not consider claims unsupported by legal authority); RAP 10.3(a)(6) (requiring that argument be supported by legal citation).

As argued, the errors are prejudicial. Br. of App. at 13-14. The State does not argue that error in admitting exhibit 10, the medical records, is harmless. Br. of Resp’t at 6. Accordingly, the conviction should be reversed and the case remanded for a new trial.

2. Alternatively, the Court should vacate the conviction for third degree assault and remand for entry of conviction for fourth degree assault.

Alternatively, the Court should remand with instruction for the trial court to vacate the conviction for third degree assault and enter conviction for fourth degree assault. Br. of App. at 14-16. The trial court failed to find that Mr. Heyer caused harm to the complaining witness that was “accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f); CP 20-23.

Therefore, the trial court found facts supporting a conviction for the lesser offense of fourth degree assault, not third degree assault. Br. of App. at 14-16.

The State concedes the defect in the written findings and conclusions. Br. of Resp't at 8. The State contends the error is harmless in light of the trial court's oral ruling. But the trial court's oral ruling is just an informal opinion that "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (internal quotation omitted). The written findings and conclusions control, not the court's oral ruling.

In support of its contention, the State cites Royster. Br. of Resp't at 8. There, the trial failed "to enter a conclusion of law finding appellant guilty of second degree theft[.]" State v. Royster, 43 Wn. App. 613, 621, 719 P.2d 149 (1986). This Court held this was harmless error because "both the order of disposition and the court's oral opinion establish that the court found appellant guilty of second degree theft." Id.

Unlike Royster, the trial court did not simply omit the conclusion that Mr. Heyer was guilty of the offense. Rather, the court failed to find an essential element necessary to support the conviction for third degree assault. Because the State bore the burden of proof, this is a negative

finding on the missing element. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Therefore, the conviction must be reversed. Br. of App. at 14-16. Because the findings support conviction for the lesser offense of fourth degree assault, the Court should remand with instruction that the conviction be vacated and to enter conviction for fourth degree assault. State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008); Br. of App. at 16.

B. CONCLUSION

For the foregoing reasons, the conviction should be reversed and the case remanded for a new trial. Alternatively, the Court should vacate the conviction and remand for entry of conviction for fourth degree assault.

DATED this 16th day of January 2018.

Respectfully submitted,

/s Richard W. Lechich
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Washington Appellate Project
Attorney for Appellant

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STATE OF WASHINGTON,)	
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v.)	NO. 49985-1-II
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AKEEN HEYER,)	
)	
Appellant.)	

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